Permitting Jobs and Business Investment

Streamlining the Federal Permitting Process

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Executive Summary

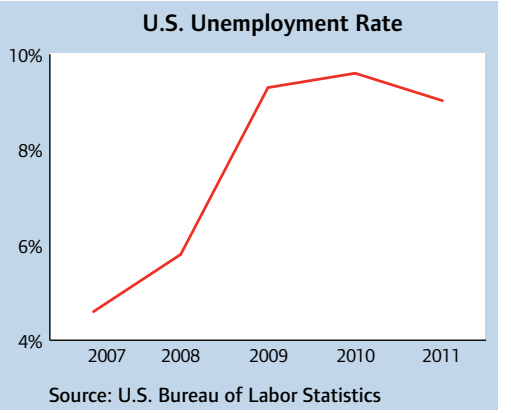
Nearly three years after the end of one of the worst recessions in its history, the U.S. economy remains mired in a fragile, uneven and uncertain recovery. Against this backdrop of subpar economic growth and high unemployment, policymakers have an obligation to identify and address factors that continue to impair U.S. economic growth and job creation.

More recently, leaders in the business and policy communities have grown increasingly concerned about the adverse economic impacts associated with excessive regulation in general and a burdensome permitting process in particular. Simply put, the federal government's permitting process is a system fraught with complexity, redundancy and uncertainty — resulting in a hostile business environment that discourages large-scale capital investments and impairs job creation.

Accordingly, the CEOs of Business Roundtable believe that it is time to simplify, streamline and accelerate America's permitting process with the goal of encouraging large-scale capital investments in the U.S. economy while maintaining the nation's commitments to health, safety and soundness. With this goal in mind, this report identifies key challenges associated with the existing regulatory permitting system and sets forth a series of recommended reforms. By adopting meaningful reforms to the permitting process, policymakers have a unique and timely opportunity to unlock private-sector investment and the jobs associated with it — placing the economy back on a clear path toward recovery.

I. Introduction

Although the recent recession has formally ended, U.S. economic growth remains subpar, unemployment remains unacceptably high and the pace of job creation remains unacceptably slow. Real gross domestic product (GDP) growth has averaged just 2.5 percent in the 10 quarters since the economy hit bottom, about half the normal economic growth rate following a recession. The unemployment rate remains in the range of 8 percent, and less than half of the 8.7 million workers who lost their jobs during the recession are back at work. Simply put, America's economy is underperforming.



Against this backdrop of economic stagnation and unemployment, policymakers have an obligation to identify and address those factors that continue to impair U.S. economic growth and job creation. Although a variety of factors may enhance or inhibit a sustained economic recovery, leaders in the business and policy communities are growing increasingly concerned about the regulatory burden imposed on private industry. In particular, there is growing concern that an overly complex and uncertain permitting process is raising the cost of doing business, discouraging domestic investment and impeding the deployment of private-sector investment throughout the economy at a time when it is sorely needed.

The CEOs of Business Roundtable applaud the efforts of Congress and the Administration to more closely examine the full costs and benefits associated with industry regulation. We agree with President Obama that the United States must "do everything we can to make it easier for folks to bring products to market and start and expand new businesses, and to grow and hire new workers."[1] The private sector, not government, must play the central role in advancing an economic

recovery and accelerating the pace of economic growth. Meaningful reform of the permitting process can unlock companies' financial assets for investment in job-creating projects — encouraging the deployment of idle capital and enhancing economic growth and private-sector job creation in the near term.

Accordingly, the CEOs of Business Roundtable call on policymakers to take immediate action to simplify, streamline and accelerate America's permitting process with the goal of encouraging large-scale capital investments in the U.S. economy while maintaining the nation's commitments to health, safety and soundness. With this goal in mind, this report identifies key challenges associated with the existing regulatory permitting system and sets forth a series of recommended reforms. By adopting meaningful reforms to the permitting process, policymakers have a unique and timely opportunity to unlock private-sector investment and the jobs associated with it — placing the economy back on a clear path toward recovery.

This report has four parts:

- It explains why increased private investment is essential to American economic growth and job creation and how permitting affects investment;
- It discusses in detail how an unduly burdensome and inconsistently applied permitting process, coupled with excessive litigation, stifles private investment;
- It offers case studies demonstrating how the permitting process is stunting economic growth and pushing industry to invest overseas — or sometimes not invest at all; and
- It offers several recommendations for reform that will help fix America's existing permitting process.

By working together, we can meaningfully reform America's broken permitting process and help encourage the investment and innovation necessary to revive the U.S. economy.

II. The Economic Rationale for Regulatory and Permitting Reform

To succeed in the modern world, America needs to unleash the power of the private sector. Large, capital-intensive projects provide the jobs that Americans need and produce the economic growth that allows the nation to compete and win in a world characterized by intense competition. In short, "[p]rivate investment is essential for ensuring economic growth … . It increases the productive capacity of an economy, drives job creation, brings innovation and new technologies, and boosts income growth."[2]

A nation's ability to thrive and compete in today's global economy is dictated by a complex and delicate interaction of factors. Social, political and economic conditions, as well as the stability provided by strong institutional enforcement of property rights, create the basic conditions necessary to support sustained economic growth and job creation. Likewise, the availability of low-cost inputs, such as land, facilities, equipment, labor, energy and materials, can provide a nation with a significant competitive advantage. Still other factors, such as the availability of a modern infrastructure and a highly specialized workforce, play an important role in enhancing business efficiency and economic growth.

Government regulations are unique in that they can have a pervasive impact on all of these factors. Regulations that are in line with broad societal values over multiple election cycles clarify the "rules of the road" and provide an environment of stability that inspires business confidence and accelerates long-term investment. In contrast, regulations that reflect parochial or short-sighted political interests, impose unproductive cost burdens on businesses and consumers, and foster an environment of uncertainty serve to undermine confidence and delay investment. Accordingly, the key distinction is not more versus less regulation but effective versus ineffective regulation.

The potential impacts of regulation are more pronounced than ever in today's hyper-competitive global economy. The rise of global supply chains and unprecedented capital mobility have greatly expanded the geographic scope

of investment opportunities, allowing business to direct capital toward those jurisdictions that offer the most favorable conditions in terms of input costs and operational efficiencies. In a globalized world, even moderate regulatory impediments can be a decisive factor in a company's decision to invest in the U.S. economy.

Permitting regulations, in particular, can play an outsized role in a company's decision about where to invest. Permitting delays and red tape can make or break the microeconomics of investment projects. For example, a new multibillion dollar power plant may be profitable over its 30-year productive lifetime if it receives permits in a timely manner. However, projected profits may be greatly reduced or even eliminated altogether if there is undue delay. This basic permitting challenge holds true for a wide range of activities, including such projects as the construction of chemical plants, solar or wind turbine manufacturing plants, and sites that provide wireless broadband capabilities. Given the substantial uncertainty surrounding permitting regulations and the importance that they play in the profitability of capital-intensive projects, companies closely monitor permitting risks, carefully account for potential delays in capital expenditure modeling and relocate investments to jurisdictions where the risks of permitting delays are lower.

If the United States is going to compete and win in today's global economy, policymakers must simplify, streamline and accelerate the permitting process, particularly for large-scale capital investments. Continued delays and opaqueness in permitting regulations will result in a shift in investments from the United States to other countries and an associated loss of competitiveness, slower economic growth and lower job creation. Efforts to streamline the permitting process have the potential to reverse this vicious cycle — unlocking new investment, accelerating capital spending and spurring greater job creation at a time when it is needed most.

III. The Burdensome, Slow and Inconsistent Permitting Process

While the overall regulatory burden on U.S. business is a significant concern, there is no single solution given its many facets and the disparate ways that different sectors of the economy are regulated. Almost all businesses, however, have identified the burdensome, slow and inconsistent permitting process as a significant obstacle to increased investment and economic growth.

As the President's Council on Jobs and Competitiveness has recognized, numerous "projects that would provide high-quality jobs are held up by a regulatory system that is unnecessarily complex and lengthy," and the United States "can take a few simple steps — without undercutting the protections that our regulatory system provides — to smooth and streamline the process for obtaining permits."[3]

The negative effects associated with a burdensome, slow and inconsistent permitting process are especially pronounced in the manufacturing, energy and infrastructure sectors. An astonishing variety of federal and state permits are needed to construct new facilities. Permit requirements are often wide ranging, and obtaining permits is time consuming and costly. All too frequently, the process is also conducted inconsistently. The consequence is that even when a company prefers to build in the United States, the volume and cost of the information, planning and analysis necessary to run the permitting gauntlet can change the siting preference altogether.

For a variety of reasons, there is often a delay in processing permits after they have been submitted. One reason is overlapping agency authority. Some agencies process permits much more slowly than others, so when multiple permits are required, one agency can act as a bottleneck that keeps an entire construction project from going forward. Agencies are sometimes staffed with inadequate expertise for the tasks required — further causing delay. Regulators likewise do not prioritize permits, meaning that a permit for a project that will produce a large economic benefit and many jobs is often stalled while agency staff considers permits or other agency activities of significantly less importance.

Excessive litigation can also stall essential projects. Many federal statutes contain so-called "citizen suit" provisions that give third parties the right to challenge an agency's decision to grant a permit. The statute of limitations for citizen suits can be far too long and the requirements to bring suit far too lax; a litigant can literally wait years before bringing a claim and then do so without posting a meaningful bond. Such third parties also can seek preliminary injunctions while their suits proceed. Only later, after the trial is complete, does the court determine whether the underlying claims ever had merit in the first place. As a result, even nonmeritorious lawsuits can effectively terminate a project through legal delays.

In short, three primary factors can undermine the effectiveness and efficiency of the federal permitting process. First, an overly complex and balkanized permitting process can place excessive demands on applicants. Many are concerned that simply too many permits are needed, each with too many requirements. Second, agencies do not process permit applications quickly or efficiently enough, and they do not apply consistent standards. And third, excessive litigation can repeatedly stall key projects, regardless of the merits of the suit. Each of these factors is discussed in more detail below.

Too Many Burdensome Permits Are Needed

The first problem undermining the permitting process is the excessive burden placed on permit applicants. While sensible regulations play an important role in protecting health, safety and the environment, the permitting process is often anything but sensible. There are far too many types of permits, agencies with jurisdiction and permit requirements. Businesses typically must spend years and millions of dollars working with numerous agencies to simply obtain the permits needed to commence a project. The result is that job-creating investments are often delayed and occasionally terminated all together.

Too Many Permits Are Required

Keeping track of which permits might apply to a particular project — much less going through the difficult process of obtaining those permits — is a daunting task. For example, according to the Environmental Protection Agency (EPA), a business involved in even ordinary construction and infrastructure projects needs to obtain permits under or be familiar with the following complex federal statutes and agencies:

- Clean Water Act (CWA), including the National Pollutant Discharge Elimination System permit program;
- Resource Conservation and Recovery Act (RCRA);
- Emergency Planning and Community Right-to-Know Act;
- Oil Pollution Act;
- Comprehensive Environmental Response, Compensation, and Liability Act;
- Toxic Substances Control Act;
- Clean Air Act (CAA);
- National Environmental Policy Act (NEPA);
- Endangered Species Act (ESA);
- National Historic Preservation Act (NHPA);[4]
- Bureau of Ocean Energy Management;
- National Oceanographic and Atmospheric Administration; and
- Religious Freedom Restoration Act (RFRA).

The EPA ominously warns, moreover, that failure to meet the requirements for these statutes can result in severe civil penalties and even "a criminal penalty of up to $250,000 and 15 years in prison."[5] Moreover, "ignorance of [a] permit requirement [is] no defense."[6]

A wide range of other permits can be required. For example, the Federal Aviation Administration often requires so-called "no hazard" tower permits for many types of structures — including wind farms.[7] The Department of the Interior likewise issues "incidental take" permits that many businesses need to operate.[8]

Those involved in meeting the nation's energy needs face even more requirements. For example, the federal government has prepared a permits matrix to assist those involved in natural gas exploration in Alaska. This matrix contains

26 separate potential permitting and consultation requirements — many for which early coordination is strongly recommended.[9] In fact, it is not unheard of for a single energy project to require 35 separate federal permits.[10] Likewise, the Department of the Interior requires extensive permits for oil exploration on the continental shelf, and the Bureau of Land Management has a detailed Application for Permit to Drill process for each well. The U.S. Army Corps of Engineers requires water permits for a great deal of land development, and the Nuclear Regulatory Commission also requires site permits. The EPA likewise requires numerous permits.

In addition to federal obligations, projects may also require state permits.[11] Indeed, if a construction project is located "near wetlands, federal, state, and local governments may all have specific permit requirements."[12] These state permitting requirements can be as numerous as federal requirements. The burden of complying with state permitting requirements is also compounded by the fact that every state is different, so gaining institutional knowledge that is transferrable across multiple projects is difficult for businesses.

Too Many Agencies Have Jurisdiction

In addition to the plethora of required permits, too many agencies manage those permits, and no single agency has overriding authority to guide a company through the permitting process. Federal agencies as diverse as the EPA, Army Corps of Engineers, U.S. Fish and Wildlife Service, National Marine Fisheries Service, Forest Service, Bureau of Land Management, Federal Energy Regulatory Commission, Department of Energy, Department of Transportation, Federal Aviation Administration, Federal Communications Commission, Bureau of Indian Affairs, and even Coast Guard all may have a say in a new energy project.[13] Many of these agencies can be involved in construction and infrastructure projects as well.

Within this laundry list of federal agencies, innumerable divisions, groups and regional offices add even more complexity to the permitting process. For instance, even a cursory review of the EPA's organizational chart demonstrates just how complex federal agencies can be — especially given that most divisions include multiple additional offices.[14] Merely understanding who is responsible for a permit can often be overwhelming.

EPA Organizational Structure

Office of the Administrator
202-564-4700
About AO

Headquarters offices:

Office of Administration and Resources Management	Office of Air and Radiation	Office of Chemical Safety and Pollution Prevention	Office of the Chief Financial Officer
202-564-4600	202-564-7404	202-564-2902	202-564-1151
About OARM	About OAR	About OCSPP	About OCFO
Office of Enforcement and Compliance Assurance	**Office of Environmental Information**	**Office of General Counsel**	**Office of Inspector General**
202-564-2440	202-564-6665	202-564-8040	202-566-0847
About OECA	About OEI	About OGC	About OIG
Office of International and Tribal Affairs	**Office Research and Development**	**Office of Solid Waste and Emergency Response**	**Office of Water**
202-564-6600	202-564-6620	202-566-0200	202-564-5700
About OITA	About ORD	About OSWER	About OW

Regional offices around the nation:

Region 1 / Boston	Region 2 / New York	Region 3 / Philadelphia	Region 4 / Atlanta
617-918-1010	212-637-5000	215-814-2900	404-562-8357
About Region 1	About Region 2	About Region 3	About Region 4
Region 5 / Chicago	**Region 6 / Dallas**	**Region 7 / Kansas City**	**Region 8 / Denver**
312-886-3000	214-665-2200	913-551-7006	303-312-6308
About Region 5	About Region 6	About Region 7	About Region 8
Region 9 / San Francisco	**Region 10 / Seattle**		
415-947-8702	206-553-1234		
About Region 9	About Region 10		

Source: www.epa.gov

The confusion naturally increases when state and local permitting authorities are added to the mix. In addition to state requirements, permitting authorities in many states have been delegated power to administer portions of federal permitting schemes under statutes such as the CWA[15] — though subject to review and supervision by federal regulators.[16] Federal supervision of state administration of federal permitting requirements adds another layer of regulatory burden to the permitting process.

Obtaining Permits Is Difficult, Time Consuming and Costly

Obtaining all the necessary permits before construction can begin is expensive and time consuming. The RCRA, which governs waste management, provides an excellent illustration of just how burdensome the permitting process can be. Indeed, the instructions alone for applying for an RCRA permit are nearly 50 pages long.[17]

According to the EPA, there are six steps to obtaining an RCRA permit:

1. "Before a business even submits a permit application, it must hold an informal meeting with the public … . The permitting agency uses the attendance list from the meeting to help set up a mailing list for the facility."

2. "After considering input from the preapplication meeting, the business may decide to submit a permit application. Permit applications are often lengthy."

3. "When the permitting agency receives a permit application, it sends a notice to everyone on the mailing list. The notice indicates that the agency has received the application and will make it available for public review."

4. In a step titled "Revisions, Revisions, Revisions," the "agency may issue a Notice of Deficiency (NOD) to the applicant. NODs identify and request that the applicant provide any missing information. During the application review and revision process, the … agency may issue several NODs … . Each time the permitting agency receives a response from the applicant, it reviews the information and, if necessary, issues another NOD until the application is complete. Given the complex and technical nature of the information, the review and revision process may take several years."

5. "When the revisions are complete, the agency makes a preliminary decision about whether to issue or deny the permit." Upon issuing a draft permit, the "agency announces its decision by sending a letter to everyone on the mailing list, placing a notice in a local paper, and broadcasting it over the radio … . Once the notice is issued, the public has 45 days to comment on the decision. Citizens also may request a public hearing by contacting the permitting agency. The permitting agency may also hold a hearing at its own discretion. The agency must give 30-day public notice before the hearing."

6. "After carefully considering public comments, [the permitting agency] must issue a 'response to public comments,' specifying any changes made to the draft permit. The agency then issues the final permit or denies the permit." However, "[e]ven after issuing a permit, the permitting agency continues to monitor the construction and operation of the facility, … [and public interest groups] have a right to appeal the final permit decision."[18]

Simply put, this process is extraordinarily burdensome on business. The burden is even more onerous because similar processes apply for the CWA, the CAA, and numerous other state and federal statutes. The consequence of these arduous permitting requirements is that constructing a new facility in the United States is very difficult, time consuming and costly.

Processing Permits Results in Delays and Inconsistencies

In addition to the excessive burden associated with the application process, the process of permit approval is frequently slow and inconsistently applied. The fact that getting a permit can literally take years forcefully underscores that the entire permitting process has simply become too unwieldy to function optimally in today's modern, fast-paced economy.

The painfully slow pace of the permit approval process was vividly illustrated when a renewable energy company applied for a permit in 2001 for an offshore

wind farm in Massachusetts worth approximately $2.5 billion. The final permit was not issued until April 2011, a full decade later.[19] Interior Secretary Kenneth Salazar quite rightly commented that "[t]aking 10 years to permit an offshore wind farm like Cape Wind is simply unacceptable."[20] Unfortunately, lengthy delays are typically the rule, not the exception.

A variety of factors can cause delay and inconsistency in the permit approval process. For instance, agencies generally are not bound by firm deadlines. The result is that although business needs to move quickly to succeed, regulators often do not have the same sense of urgency. Agencies also sometimes lack personnel capable of assessing the requisite issues and trained to resolve all issues in the agency's purview. When agencies have overlapping jurisdictions, there can also be sequencing problems. To get a new project under way, a business needs permits from numerous agencies. So if even one agency is slow in processing a permit application, an entire project is stalled, despite the many other permits that the project has already received. Furthermore, agencies do not always prioritize permits. Finally, there are too many administrative avenues to challenge permits, greatly increasing delay.

No Deadlines Are Required

In business, "time is money."[21] Financing and other considerations turn on how long a project will take to get under way. If a project promises to take too long, it does not make sense to pursue it. Accordingly, for economic development to occur, permit applications should be reviewed within a matter of weeks or months — never years. Regulators, however, do not face the same time constraints or sense of urgency, as most statutes do not require prompt processing. Without a statutory requirement to get things done quickly, delay seems inevitable.

Shell's recent experience in Alaska dramatically underscores the need for firm deadlines. Beginning in February 2006, Shell began working with the EPA to obtain air permits. But "[d]uring the five years of working with EPA to obtain [those] permits, [Shell] ha[s] spent thousands of man-hours and tens of millions of dollars … [but] still does not have a single effective air permit."[22]

Expertise and Training Are Inadequate

Agencies often do not have well-trained personnel to review permit applications in a timely, predictable manner — making delay a virtual certainty.

This point is amply underscored by Shell's experience in Alaska. One reason for the intolerable delays in that case is that "EPA Region 10 [did] not have adequate staff levels to process Shell's … permits."[23] Moreover, while the EPA is responsible for overseeing CAA permitting on the outer continental shelf (OCS), the Department of the Interior is responsible for the CAA throughout much of the Gulf of Mexico, and on land, "most 'new source' permits are written by states which either have delegated air permitting authority or implement their own state program that EPA has approved as part of their State Implementation Plan."[24] EPA accordingly "has failed to develop sufficient expertise" for this particular aspect of its regulatory portfolio and does not have "permitting experience that would assist them in timely processing [of] … permit applications."[25]

Inefficient Sequencing and Jurisdictions Overlap

Before a project can commence, a business may need to receive permits from a large number of different agencies. As a result, if just one agency is delayed, an entire project cannot go forward, even if every other agency has issued its respective permits.

Other nations have avoided the sequencing problem by empowering a single regulator with primary responsibility for granting all licenses, approvals and permits. Norway, an energy-producing nation, is a prime example of the benefit of having a single regulator. Unlike the United States, Norway empowers one entity, the Petroleum Safety Authority, to oversee all aspects of a project — "from planning and design through construction and operation to possible ultimate removal."[26] A similar structure is used in Brazil and Mexico. This consolidated permitting authority eliminates the sequencing problem and streamlines the permitting process.

Agencies Fail To Prioritize

Agencies also do not prioritize their permitting efforts sensibly. It stands to reason that projects that will create a large number of new jobs should receive expedited attention — especially in a time of high unemployment. Projects that

will create a significant number of jobs also are often extremely capital intensive, making them particularly sensitive to delay.

There Are Too Many Avenues To Review Proposed Permits

Finally, opponents of a particular project have too many opportunities to seek administrative review. Indeed, permit review can occur at the local, state and federal levels. Every instance when review is sought, however, can add months and sometimes even years to the time that it takes to complete the permitting process. This duplicative review is unnecessary, and agencies are typically lenient in allowing third parties to seek review, even if they cannot show any personal injury.

Litigation Also Delays Construction Projects

Even after an applicant has run the administrative gauntlet and received the requisite permits, private litigants often bring suit in court — pursuant to citizen suit provisions — to freeze the project pending judicial review. Because obtaining judicial interference is too easy for these third parties, a project sometimes is preliminarily enjoined for tangential reasons even though, after the case is heard on the merits, the court determines that the project is perfectly lawful. Moreover, courts occasionally issue permanent injunctions even for projects that have been approved by the responsible agency. The consequence of this excessive litigation is that even receiving regulatory approval often is not enough to actually allow a project to commence.

Citizen Suits Are Too Plentiful

Many statutes contain citizen suit provisions that allow third parties to sue agencies after permits are issued. Indeed, NEPA's citizen suit provisions allow suit to be brought a full six years after issuance. Moreover, citizen suit provisions often have very lax standing requirements, allowing plaintiffs with no meaningful connection to the permitting process to file suit. Citizen suits are authorized under NEPA, CAA, CWA, ESA, NHPA and RFRA. Each is briefly discussed below.

- **NEPA:** NEPA has one of the most burdensome citizen suit provisions. Under NEPA, federal agencies must prepare an environmental impact statement (EIS) for all "major Federal actions significantly affecting the quality of the human environment."[27] This ill-defined requirement creates various

avenues for delay. On the one hand, if an EIS is not prepared, a plaintiff can sue saying one should have been prepared. But on the other hand, if the agency did prepare an EIS, a plaintiff can still sue, claiming that the EIS is inadequate. In short, "NEPA analysis requirements are so vague that they are open to considerable interpretation; and thus, whatever amount of analysis is provided remains an easy target for litigation by groups opposed to a proposed management plan."[28] Even when federal agencies, such as the Federal Communications Commission, have adopted more defined and streamlined implementing regulations, those regulations continue to be characterized by delays and open-ended authorization processes, even for the most minimally invasive projects. Likewise, because NEPA has such a lengthy statute of limitations, a lawsuit can be brought to challenge a permit issued years earlier.[29]

- **CAA:** The citizen suit provision under the CAA is twofold. First, it authorizes actions "against any person who proposes to construct or constructs any new or modified major emitting facility without [an appropriate permit] … or who is alleged to have violated … or to be in violation of any condition of such permit."[30] Second, suit can also be brought against administrators who fail to perform nondiscretionary duties under the CAA.[31]

- **CWA:** Like the CAA, the CWA also authorizes suit against those both seeking and issuing permits. Indeed, the CWA allows suit "against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation."[32]

- **ESA:** This citizen suit provision broadly opens the door for litigation seeking to enjoin projects alleged to contravene the ESA.[33] Because the ESA places an "incalculable" value on the protection of endangered species, pleading a violation of the ESA is easy even when the facts ultimately do not support the claim.[34]

- **NHPA:** When a project receives federal funds or requires a federal permit, NHPA mandates that the agency take steps to review the project's potential impact on historical sites.[35] Accordingly, NHPA litigation arises in two ways: When no review is undertaken, plaintiffs claim that review is required; when

review is completed, plaintiffs claim that review was inadequate. As with NEPA, such open-ended claims can stall projects. "Although [NHPA] does not prevent a proposed federal undertaking from going forward, the required review process and associated litigation can potentially delay a project for years, increasing exponentially expenses related to the project."[36]

- **RFRA:** The federal government is forbidden from imposing a "substantial burden" on religious exercise, unless that burden "is in furtherance of a compelling governmental interest … [and] is the least restrictive means of furthering that compelling governmental interest."[37] This statute is another one used to challenge permits.

Through abusive use of citizen suit provisions, groups opposed to projects often may bring suit and potentially delay construction projects. For example, construction of a power plant in Arkansas has recently been stalled by a litigant "using virtually every statute and regulation at its disposal, challenging permits and approvals under the Clean Air Act, Clean Water Act, National Environmental Policy Act, and several others."[38] Likewise, a $6 billion project in Ohio, approved in 2008, still has not come online because of litigation.[39]

Preliminary Injunctions Are Too Readily Issued

Citizen suits are particularly problematic because preliminary injunctions are too readily issued. A preliminary injunction will freeze a project in its tracks, even if a business has already obtained all the necessary permits and even if serious job losses and other economic harm will result. Exacerbating this problem, moreover, is NEPA's lax bond requirement. In an ordinary case, a plaintiff must post bond to win a preliminary injunction,[40] but "where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered."[41] This NEPA exception to the bond requirement encourages meritless litigation.

A preliminary injunction may be issued when a court determines that, among other factors, the costs associated with delaying a project are not unreasonable when balanced against alleged environmental concerns. But courts are often too quick to discount the serious costs imposed by a preliminary injunction on job creation and economic growth. Courts have entered a preliminary injunction even when the resulting hardship to the company is "cast principally in economic terms of employment loss."[42] Indeed, a federal court in West Virginia preliminarily

enjoined a mining project even though halting the project would lead to the dismissal of as many as 180 employees.[43] Another court has flatly stated that "economic harm ... is not irreparable, … [and m]ore than pecuniary harm must be shown to outweigh environmental harm."[44]

The profound danger of preliminary injunctions is demonstrated by the fact that after a preliminary injunction or temporary restraining order has been issued and a project stalled, a court may determine that the underlying claim was meritless all along. Unfortunately, this determination is not uncommon. For example, in one case, the Ninth Circuit vacated a district court's preliminary injunction against a logging company that had been in place for more than a year.[45] In another case, the Tenth Circuit vacated a temporary restraining order and preliminary injunction that had been in place for approximately 14 months.[46] Likewise, a district court lifted a temporary restraining order that had enjoined a project for nearly six months, finding for the defendant on the merits.[47] Numerous other examples are available.[48]

Permanent Injunctions Result in Wasted Resources

Sometimes courts enter permanent injunctions against projects — even when the projects have been approved by the responsible agency. As a result, even when a company has gone through the entire permitting process, it may never be able to complete its investment. For instance, the Ninth Circuit upheld a district court's permanent injunction of an irrigation project that was found to affect endangered salmon.[49] Another court permanently enjoined construction on a wastewater treatment project that was not in compliance with NHPA requirements, despite considerable economic harm to the company.[50]

The possibility of litigation of this sort, after years of going through the agency permitting process, is a powerful disincentive to beginning the process in the first place. Further, even in cases where injunctions are not issued, unsubstantiated allegations of a statutory or regulatory violation can sometimes nonetheless bring a project to a halt.

IV. Case Studies: Specific Examples of a Broken Permitting Process

Some of the problems set forth in Section III are illustrated by the following case studies. As these examples confirm, the permitting process is dragging down economic growth and thwarting job creation.

Keystone XL Pipeline

The proposed Keystone XL pipeline is an approximately 1,661-mile, 36-inch crude oil pipeline that would begin in Alberta, Canada, and would extend through Saskatchewan, Montana, South Dakota, Nebraska, Kansas, Oklahoma and Texas. Once fully constructed, Keystone XL would ensure a safe and reliable supply of Canadian crude oil to U.S. refineries in the Gulf of Mexico region and would further diversify supplies of crude oil, thus improving national energy security. Keystone XL also would create 20,000 high-wage construction and related manufacturing jobs almost immediately at a time when the U.S. economy continues to struggle. Over its projected life, Keystone XL would generate more than $5 billion in property taxes to state and local governments along its path. TransCanada, the pipeline sponsor, has estimated that local businesses along the pipeline route would benefit from the 118,000 spinoff jobs Keystone XL would generate.

Because Keystone XL crosses the U.S./Canada border, it is required to secure a Presidential Permit based on a determination that the project is in the national interest. The Department of State is responsible for reviewing the proposed project to make this determination. One key part of this analysis is to conduct an environmental assessment under NEPA.

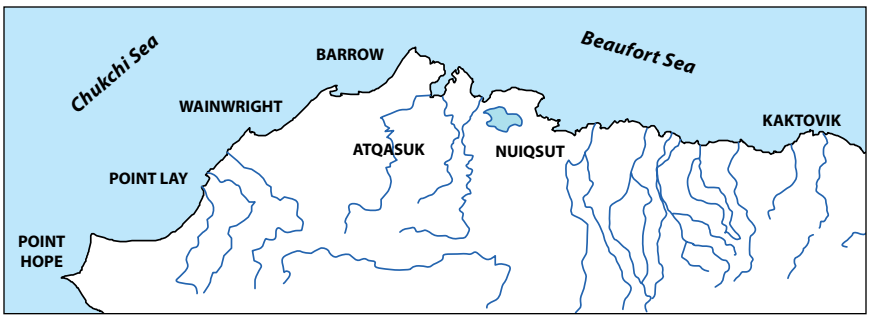
TransCanada filed its application for a Presidential Permit with the Department of State in September 2008. On April 16, 2010, the Department of State published a draft EIS, which determined that there were no substantial environmental concerns that would prohibit approval of the permit. A final EIS was published on August 26, 2011, which again found minimal environmental concerns.

On November 10, 2011, after more than three years of exhaustive review, including numerous public hearings and multiple opportunities for public comment, the Department of State announced that it would conduct a further environmental review based on a rerouting of a portion of the proposed project in Nebraska and that, as a consequence of this further review, a final decision would not be made before the first quarter of 2013, nearly five years after the application was filed. By way of comparison, Canada approved its portion of the project in March 2010, substantially less than two years after the application was filed there. Frustrated with the Administration's continued delays, on December 17, 2011, Congress passed, and the President signed into law, legislation requiring the President, no later than 60 days after enactment, to issue a permit for Keystone XL unless "the President determines that the Keystone XL pipeline would not serve the national interest." On January 18, the Administration, citing a "rushed and arbitrary deadline," announced that it could not find the current application in the national interest.

The Department of State has exhaustively analyzed the potential environmental impacts of the Keystone XL pipeline. This review has lasted for more than three years at a cost of many millions of dollars. The energy security and economic benefits of the project are apparent. The decision to approve this $7 billion pipeline project should have been an easy one for the Administration to make. Unfortunately, it has become yet another example of how difficult, if not impossible, gaining approval to expand any business is in the United States.

Shell Exploration for Oil and Natural Gas in Alaska's OCS

Shell's efforts to obtain permits to drill for oil and natural gas in Alaska are a painful illustration of just how unnecessarily burdensome the permitting process



has become. Since 2005, the federal government has held several OCS lease sales in Alaska. Bonus payments to the federal treasury have exceeded $3 billion. Shell alone paid nearly $2.2 billion for leases. To date, despite Shell having invested approximately $1 billion to prepare for drilling, not a single well has been permitted.

Although many federal and state permits are needed, the primary barrier has been the inability to secure a final, useable air permit from the EPA. Shell's proposed exploration plan involves a mobile drill rig that will operate for less than three months a year. The EPA has spent literally years working on the air permits for this temporary rig. The most recent air permits issued by the EPA were rejected by the Environmental Appeals Board (EAB) on the grounds that more information is needed about when a drilling rig becomes a "source" and that more analysis is needed about the impact of emissions from the exploration work on the health of residents on shore.[51] The EAB decision forced Shell to cancel its 2011 exploration program altogether. Other potential investors have watched Shell's travails and have become significantly less interested in investing in Alaska themselves.

Further development of Alaska's resources would be an engine for job creation, economic growth and government revenue. According to a recent study by the Institute of Social and Economic Research at the University of Alaska, commercialization of Alaska's OCS oil and gas resources could generate $193 billion in revenues to federal, state and local governments over a 50-year period and an annual average of 54,700 jobs nationwide, with an estimated cumulative payroll amounting to $145 billion in today's dollars over the next 50 years. These benefits can occur only if needed permits are obtained in a timely and predictable manner.[52]

Offshore Alaska oil and gas resources are likely world class and could contribute significantly to the nation's energy security, as well as the long-term viability of the Trans-Alaska Pipeline System (TAPS). TAPS is critical national infrastructure that moves oil from the Arctic to U.S. markets and consumers in the lower 48 states. Without development of additional crude supplies in Alaska, TAPS throughput will continue to decline and eventually put the pipeline at risk. Developing Alaska's OCS resources offers the opportunity to reverse that decline. Alaska has provided the United States with a significant portion of its domestic production for decades. Today, the fields of Alaska's North Slope continue

to supply 15 percent of U.S. crude oil production but, because of permitting problems like those experienced by Shell, are in decline. As of March 28, Shell finally received the air permits it needs to commence drilling operations this summer and is awaiting a few more permits that appear to be on track. There is pending litigation challenging a number of the permits.

Avenal Power Center

The Avenal Energy Project, a proposed state-of-the-art, 600-MW gas-fired electric power plant in Kings County, California, provides another illustration of how the EPA permitting process can become a regulatory quagmire that undermines the development of industrial infrastructure.

In February 2008, Avenal Power filed an application with the EPA for a permit to construct and operate the Avenal Project. The application was filed under the Prevention of Significant Deterioration (PSD) permit program under Title I of the CAA. The PSD permit program applies to new major stationary sources of air pollutants. It is a preconstruction review and permit program that, in general, requires new major stationary sources to apply the best available control technology to limit emissions of air pollutants.

Section 165(c) of the CAA requires the EPA to act on an application for a PSD permit within one year.[53] The application for a permit for the Avenal Project was completed in March 2008. For the next two years, the EPA engaged in an

Source: avenalpowercenterllc.com

elaborate and exhaustive permitting process that included a public notice and comment period as well as a public hearing. Ultimately, the EPA never acted on the Avenal application.

In March 2010, one year after the statutory deadline for EPA action on the application, Avenal filed a lawsuit against the EPA in the U.S. District Court for the District of Columbia. The lawsuit sought judicial relief to remedy the agency's violation of Section 165(c).

In April 2010, a revised National Ambient Air Quality Standard for nitrogen dioxide (NO_2) took effect. Although Avenal had filed a completed application for a PSD permit in March 2008, the EPA argued that the Avenal Project would be required to comply with the revised NO_2 standard — even though that revised standard became effective more than one year after the statutory deadline for EPA action on the Avenal application.

In February 2011, nearly three years after the permit application was filed, the EPA reversed its position and announced that, in light of its statutory obligation to act within one year, the agency would grandfather the permit application for the plant. Thus, the Avenal project would not be subject to either the revised NO_2 standard or, for example, EPA regulations on greenhouse gas emissions that became effective in January 2011. The delay was not over, however, because the EPA merely promised to issue a permit decision that could be appealed to the EAB. Such an appeal could take up to an additional 18 months to be resolved — meaning a final permit might not be issued until almost five years after the permit application was filed.[54]

In May 2011, the District Court ordered the EPA to issue a *final* permit decision by August 2011.[55] The District Court rejected "absurd" EPA arguments that the statutory deadline imposed by Section 165(c) was inapplicable to permit decisions appealed to the EAB.[56] The District Court ruled that the EPA cannot use the EAB appeals process "as an excuse, or haven, to avoid statutory compliance."[57]

On August 31, 2011, the EPA issued a PSD permit for the project.[58] Numerous interest groups have petitioned the Ninth Circuit U.S. Court of Appeals to overturn the decision.

Spruce Surface Coal Mine

In January 2007, the U.S. Army Corps of Engineers issued a dredge and fill permit to Mingo Logan Coal Company authorizing the discharge of fill material at its Spruce No. 1 mine in Logan County, West Virginia, pursuant to Section 404 of the CWA. The permit was issued following extensive consultation with the EPA, numerous modifications of the permit to address EPA concerns and ultimate EPA concurrence for issuance of the permit. In January 2011, the EPA issued a final determination under Section 404(c) of the CWA that effectively revoked the permit. This unprecedented use by the EPA of Section 404(c) to revoke a validly issued and existing permit establishes a dangerous precedent that undermines the integrity of the permitting process and threatens to chill investment in activities that require Section 404 permits. Such activities contribute $220 billion to the U.S. economy each year and "hundreds of thousands of jobs."[59]

The facts are bleak. The Corps issued a Section 404 permit for the Spruce No. 1 coal mine after 10 years of rigorous review during which the EPA actively participated in the preparation of two EISs under NEPA. Almost three years after the Corps issued the permit and after mining operations had commenced, the EPA requested that the Corps revoke the permit. The Corps, after consultation with the West Virginia Department of Environmental Protection (WVDEP), refused to revoke the permit, noting that "[t]here is no compelling information that indicates the authorized mining would contribute to significant degradation of the aquatic environment."[60] WVDEP was even more scathing, noting that portions of the EPA's argument are "nothing more than a red herring" and that the EPA has given "little or no consideration for other agencies, the laws, rules or regulations they enforce, which address wildlife and wildlife habitat considerations."[61]

Undaunted, the EPA, which is not the permitting authority, over the objections of the Corps and state of West Virginia, unilaterally initiated a review of the activity authorized by the issued 404 permit at the Spruce No. 1 mine, relying for the first time on Section 404(c) of the CWA. This three-years-after-the-fact review focused primarily on downstream water quality issues, which are the responsibility of the WVDEP, and on other concerns that were carefully addressed by the Corps and the EPA during the permitting process. In March 2010, the EPA issued

a proposed determination that contemplated a prohibition on the disposal of mining waste from the site. Mingo Logan challenged the EPA's proposed action in the U.S. District Court for the District of Columbia. The lawsuit, as amended, seeks a court order that would enjoin any EPA action to revoke the Section 404 permit for the coal mine and deem such revocation arbitrary and capricious.[62]

In January 2011, the EPA issued its final determination withdrawing the authority to discharge fill material under the Spruce No. 1 404 permit. The EPA states that the determination is not based on any violation of a permit condition or of any water quality standard but, instead, on the EPA's determination that the project (although unchanged from before) will now result in "unacceptable adverse effects" and an arbitrary standard.[63]

In May 2011, Mingo Logan moved for summary judgment. In June, numerous nonmining industries that rely on and require Section 404 permits, including manufacturing, transportation infrastructure construction, railroads, home construction, agriculture and industrial minerals, and several business trade associations, filed a brief in support of the motion, which also included an economic study detailing the impacts of the decision on mining and nonmining interests. The brief argues that the unprecedented revocation under Section 404(c) of a permit previously issued and with no allegation of any violation of law will have a significant adverse impact on the U.S. economy as a result of, for example, delayed and deferred investment in new activities that will require Section 404 permits.

On November 30, 2011, the D.C. District Court held oral arguments on the limited issue of whether the EPA has legal authority to invoke 404(c) to veto an issued Section 404 permit. The government argued vigorously that the court should address the entirety of the case, not just the legal authority issue. The court also overruled another of the government's objections and admitted the multi-industry amicus brief, which included an economic study on the broader ramifications of such authority. On March 23, District of Columbia Federal District Court Judge Amy Berman Jackson overruled the EPA on the grounds that it had exceeded its statutory authority under the Clean Water Act. It is unclear whether the Administration will appeal this decision.

Purdue University

In testimony before the House Energy and Commerce Committee last year, a key administrator at Purdue University depicted the negative role that regulatory and permitting uncertainty has on capital investment. Dr. Robin Mills Ridgway, Purdue's director of environmental health and safety regulatory compliance, indicated that the university has many research activities that are covered and affected by EPA permit regulations, including:

- Confined animal feeding operations with swine, poultry, dairy and beef, which are covered by EPA confined animal feeding operation regulations;
- A federally permitted hazardous waste treatment storage and disposal facility;
- A campus storm water permit that covers runoff from construction projects and other nonpoint source runoff from campus;
- A Purdue-owned and -operated public water supply that supplies drinking water to campus; and
- A primarily coal-fired combined heat and power facility that supplies nearly all of the campus heating steam and chilled water and on average 60 percent of the campus electricity. This facility holds a point source National Pollutant Discharge Elimination System permit for process waste water and has various CAA regulations that currently apply or will apply to it.[64]

As Dr. Ridgway testified,

> As uncertainty increases, the impact spectrum broadens. The projected impact of layered regulations then becomes a driving factor in decision making, potentially causing the administration to delay a decision until there is more certainty.[65]

Indeed, a large capital project — the so-called "Boiler 6 project" — was dropped altogether because of regulatory uncertainty.[66]

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These examples confirm that the permitting process has gone awry. Capital-intensive projects often cannot be pursued in the face of uncertainty. The consequence all too often is that promising opportunities for economic growth and job creation are stifled by a regulatory and permitting environment that simply does not make sense.

V. Recommendations for Reform

To enable America's economy to move forward and compete in the modern world, the permitting process must be reformed. The nation simply cannot afford the costs, delays and inconsistencies that define the process to get a permit to build the sort of capital-intensive projects needed to expand the U.S. economy and provide good jobs for the nation's workers.

These challenges are not intractable, and there are examples in which permitting process reforms have been successful. For instance, in 2006, Congress enacted Section 6002 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) for federal highway projects. This act streamlines the NEPA review process by designating the Department of Transportation (DOT) as the lead agency and sets a 180-day statue of limitations to challenge the DOT's determinations. According to a September 2010 report, these changes have cut the time to complete NEPA review nearly in half and are encouraging prompt disposition of lawsuits.[67] Given the proven success of SAFETEA-LU, the changes should be expanded broadly to include all agencies.

Another successful precedent for reforming the permitting process relates to TAPS. To facilitate the "construction and completion of the pipeline system," Congress exempted the pipeline from NEPA's requirements and required that all judicial challenges be brought within 60 days.[68] Likewise, a district "court shall not have jurisdiction to grant any injunctive relief against the issuance of any right-of-way, permit, lease, or other authorization pursuant to this section except in conjunction with a final judgment," with appellate review limited to a "petition for a writ of certiorari to the Supreme Court of the United States."[69] Congress expressly recognized that strategic litigation can be used as a pretext to stall essential projects and accordingly found a way to ensure that meritorious claims could still be heard but also guarantee that permits would not be unduly delayed.[70] That same principle is equally valid today.

In the American Recovery and Reinvestment Act of 2009 (ARRA), Congress mandated that projects receiving funding under the act be given expedited NEPA review using "the shortest existing applicable process."[71] This mandate led to faster processing of NEPA permits, and the overwhelming majority of projects were not subjected to the longest available review process. Again, this change provides an important and recent precedent for how the permitting process should work more generally.

Given that many of the problems pertain to agency delays in processing permit applications, the Administration should also task the Office of Management and Budget (OMB) with the responsibility to create an online portal or dashboard that the public can use to track the processing time of each permit application. Creating a transparent accounting of agency processing time will provide an incentive for federal agencies to improve their performance and thus increase the speed by which permit applications are acted upon. It is envisioned that the public would be able to access this portal and easily find pertinent information about any particular operating permit application. For illustrative purposes, a mockup of a potential online portal is shown in the Appendix. As illustrated in the mockup, the portal should emphasize processing time and give the viewer the ability to look across federal agencies to quickly determine their performance.

More broadly, Business Roundtable offers the following recommendations for reform to more systematically upgrade and improve the federal permitting process:

Business Roundtable Recommendations for Reform

Problem	**There are too many permits issued by too many agencies, and obtaining permits is unduly difficult, time consuming and costly.**
Recommended Solution	As a first step, OMB should issue a Budget Data Request to all agencies, requiring them to promptly submit information about the permitting processes they administer for each type of permit separately, including the purpose of each permit; the sectors most heavily affected; the volume of permit applications; the amount of time the agency takes to respond; the average number of regulatory and court challenges and the amount of time resolving such challenges takes; the total costs associated with the permitting process; and a summary and explanation of how the agency informs stakeholders and the general public of the status of projects and what standards the agency uses to make decisions. Agencies should catalog and work with the business community to develop best practices.
Problem	**Agencies (and other approving authorities) do not have meaningful deadlines.**
Recommended Solution	Congress should enact legislation requiring agencies to process permit applications within a definite time frame that is reasonable based on the industry, the project at issue and the phase of the process. Even the most complex permit applications should have their reviews completed within 180 days, and failure to do so should require a report and explanation to Congress and OMB. Delays of more than one year should trigger automatic investigations by the agency's inspector general, with a report to Congress by the inspector general.
Problem	**Agencies have inadequate expertise and training.**
Recommended Solution	After reviewing which types of permits create the greatest problems, agencies should devote agency resources to those areas most in need of reform.
Problem	**Overlapping jurisdictions cause bottlenecks.**
Recommended Solution	Congress should designate a single agency to have permitting responsibility for each project and should ensure that permits are processed by multiple agencies in parallel.
Problem	**Permit delays often occur at the state level due to federally required permitting requirements.**
Recommended Solution	After streamlining the permit process at the federal level, government agencies should work with state authorities to incorporate streamlining improvements into state permitting programs through State Implementation Plans. This will help fully capture the value of streamlining initiative throughout the permitting process.

Problem	**Agencies do not prioritize.**
Recommended Solution	Congress and OMB should require agencies to process permit applications on an expedited basis relative to other agency activities and with "the shortest existing applicable process."
Problem	**Agencies are not transparent.**
Recommended Solution	The President should assign OMB to lead the creation of an online Internet permit tracking portal or dashboard that would track the dates and status of all federal permit applications across agencies.
Problem	**Agencies are not accountable.**
Recommended Solution	At a minimum, Congress and/or the President should direct permitting agencies to report twice per year to OMB on the status of all newly filed and completed permit applications, the date each was filed, and the expected or actual completion date. Then OMB should report a compilation of all such data to Congress and the public annually.
Problem	**Citizen suits are too plentiful.**
Recommended Solution	Congress should universalize the 180-day statute of limitations for judicial review that it created in SAFETEA-LU § 6002. Congress should also clarify that those challenging permits need to satisfy the same bond requirement as in all other suits — including in the NEPA context. OMB and the agencies should work to require greater upfront public engagement to ensure that all issues are raised in a timely manner.
Problem	**Preliminary injunctions are too readily issued.**
Recommended Solution	Congress should clearly state that economic harm and potential job losses should be given significant weight in all preliminary injunction cases. Those seeking a preliminary injunction, moreover, should also always be required to show a strong likelihood of success on the merits.
Problem	**Permanent injunctions result in wasted resources.**
Recommended Solution	Congress should establish that permanent injunctions are impermissible in all but the most extraordinary of circumstances when a federal agency has approved a regulatory permit.

VI. Conclusion

The regulatory permitting process is overly complex and uncertain. There are too many burdensome permit requirements administered by too many agencies. There also are significant delays in processing permits. Agencies frequently are not subject to deadlines. Because agencies have overlapping jurisdictions, moreover, there is a serious sequencing problem, as one agency can hold up a project, even though numerous agencies have already issued permits. Finally, even after a permit has been issued, tactical litigation can still delay construction. Citizen suits are too easily brought, and preliminary injunctions are too readily granted. The consequence of these factors is that many job-creating projects are delayed, located elsewhere or not built at all.

Given the state of the economy, the permitting process is a timely problem that warrants careful attention by policymakers. Major energy projects face particularly daunting permitting obstacles. The government should ensure, for all sources of energy, that viable projects are not unnecessarily delayed through an ineffective and slow permitting process. By reducing the unnecessary burdens on capital-intensive projects, more companies will build large projects in the United States, which will create economic growth and provide quality jobs.

In this report, Business Roundtable CEOs make several recommendations for improving the permitting system. A vital first step would be the creation of an online portal that the public can use to easily determine the speed with which a particular federal agency is processing a particular permit application. Such a portal would create a powerful incentive across federal agencies to process permit applications more quickly, spurring job creation. In addition, an obvious near-term improvement would be to draw upon the best practices from the experience of SAFETEA-LU, TAPS and ARRA. But a broad range of improvements involving each stage of the federal permitting process needs to be considered and implemented expeditiously for the benefit of the national economy and the American people.

Appendix:
Example Database for Federal Permit Tracker

Following is an example of a potential online portal that the public would be able to access and use to find pertinent information about any particular operating permit application.

Project: ACME Arizona Cement Plant DETAILS ▼

Company	Permit Type	Agency	Permit Status	Application Date	Days Opened	Target Days	Time Status
ACME Cement Company	NESHAP	EPA	Pending	1/1/2011	280	180	**Past** Target Date
ACME Cement Company	Endan-gered Species	Interior	Pending	4/1/2011	190	220	Approaching Target Date

Endnotes

[1] Remarks by the U.S. President at Cree, Inc., at www.whitehouse.gov/the-press-office/2011/06/13/remarks-president-cree-inc-durham-north-carolina.

[2] "The Policy Framework for Investment," Organisation for Economic Co-operation and Development Policy Brief (September 2006) at www.oecd.org/dataoecd/40/25/37408438.pdf.

[3] President's Council on Jobs and Competitiveness at www.jobs-council.com/docs/JC_Framing_v2.pdf.

[4] See "Federal Environmental Requirements for Construction: What Do You Need To Consider?" 2–7 at www.epa.gov/compliance/resources/publications/assistance/sectors/fedenvconstruction.pdf.

[5] *Ibid.* at 1.

[6] See, e.g., *United States v. Hayes Intern. Corp.*, 786 F.2d 1499, 1503 (11th Cir. 1986).

[7] See, e.g., Kari Lydersen, "Wind-Power Projects Halted," *Washington Post* (June 10, 2006) at www.washingtonpost.com/wp-dyn/content/article/2006/06/09/AR2006060901420.html.

[8] See, e.g., "Endangered Species Program: Permits — Frequently Asked Questions" at www.fws.gov/endangered/permits/faq.html.

[9] See "Alaska Natural Gas Transportation Projects" at www.arcticgas.gov/sites/default/files/permit-matrix/permits-matrix-master.pdf.

[10] See Statement of David Lawrence, executive vice president, exploration & commercial, Shell, before the Energy and Power Subcommittee of the U.S. House of Representatives Energy and Commerce Committee, at 28 (April 13, 2011) [hereafter Statement of David Lawrence].

[11] See "Environmental Permits" at www.sba.gov/content/environmental-permits (listing "just a few of the permits that may be required" and also including links to every state in the nation).

[12] *Ibid.*

[13] See "Alaska Natural Gas Transportation Projects" at www.arcticgas.gov/sites/default/files/permit-matrix/permits-matrix-master.pdf.

[14] See "EPA Organizational Structure" at www.epa.gov/aboutepa/organization.html.

[15] See, e.g., "National Pollutant Discharge Elimination System: State Program Status" at http://cfpub.epa.gov/npdes/statestats.cfm.

[16] See, e.g., *Montana. v. EPA,* 137 F.3d 1135, 1138 (9th Cir. 1998).

[17] See "RCRA Hazardous Waste Part A Permit Application: Instructions and Form" at www.epa.gov/osw/inforesources/data/form8700/8700-23.pdf.

[18] "The Hazardous Waste Permitting Process: A Citizens Guide" at www.epa.gov/osw/hazard/tsd/permit/prmtguid.htm.

[19] Steve LeBlanc, "Feds Approve Cape Wind Power Project Off Massachusetts Coast," *USA Today* (April 19, 2011) at www.usatoday.com/money/industries/energy/2011-04-19-cape-wind-power-electric.htm.

[20] *Ibid.*

[21] *Bartlett's Familiar Quotations* 348 (Emily Morison Beck ed., 15th ed. 1980).

[22] Statement of David Lawrence at 28. On October 21, 2011, U.S. EPA Region 10 issued the air permits Shell needs to begin its offshore Alaska exploration program. Environmental group petitioners immediately appealed the decision to the EPA's Environmental Appeals Board (EAB). On January 12, 2012, the EAB denied petitions for review of the air permit. However, environmental petitioners have threatened to litigate. Shell's experience is discussed in detail in Section III of this report.

[23] *Ibid.* at 35.

[24] *Ibid.* at 34–35.

[25] *Ibid.* at 34. On December 23, 2011, the President signed HR 2055, which, among other things, transfers authority for future Arctic offshore air permitting to the Department of the Interior.

[26] See, e.g., "Petroleum Safety Authority: About Us" at www.ptil.no/about-us/category89.html.

[27] 42 U.S.C. § 4332(2)(C).

[28] "Summary of Public Comment: CEQ Review of NEPA" (Dec. 20, 2002) at http://ceq.hss.doe.gov/ntf/catreport/ceq_exsummary.pdf.

[29] See, e.g., Task Force on Improving the National Environmental Policy Act and Task Force on Updating the National Environmental Policy Act, *Initial Findings and Draft Recommendations* 19 (Dec. 21, 2005) at www.law.georgetown.edu/gelpi/research_archive/nepa/NEPATaskForce_FinalDraft.pdf ("[F]our years after the Record of Decision on the U.S. 95 highway, work was halted due to a NEPA-related lawsuit.").

[30] 42 U.S.C § 7604(a)(3).

[31] *Ibid.* § 7604(a)(2).

[32] *Ibid.* § 1365.

[33] *Ibid.* § 1540(g).

[34] *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 187–88 (1978).

[35] See 16 U.S.C. § 470f.

[36] Joe P. Yeager, *Federal Preservation Law: Sites, Structures & Objects,* 8 Widener L. Symp. J. 383, 397 (2002).

[37] 42 U.S.C. § 2000bb-1.

[38] *Progress Denied: A Study on the Potential Economic Impact of Permitting Challenges Facing Proposed Energy Projects* 35 (2011) at www.projectnoproject.com/wp-content/uploads/2011/03/PNP_EconomicStudy.pdf.

[39] See "Baard Energy, Coal-to-Liquids Plant, OH," at www.projectnoproject.com/2010/12/baard-energy-coal-to-liquids-plant-oh/.

[40] Fed. R. Civ. P. 65(c).

[41] *Davis v. Mineta,* 302 F.3d 1104, 1126 (10th Cir. 2002).

[42] *South Fork Band Council v. Dep't of Interior,* 588 F.3d 718, 728 (9th Cir. 2009).

[43] *Ohio Valley Envtl. Coal. v. U.S. Army Corps of Eng'rs,* 528 F. Supp. 2d 625, 632 (S.D. W.Va. 2007).

[44] *Colorado Wild Inc. v. U.S. Forest Service,* 523 F. Supp. 2d 1213, 1222 (D. Colo. 2007); see also *Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 1113, 1125 (9th Cir. 2004) (issuing preliminary injunction against a residential development project, despite the fact that plaintiff party would suffer "financial hardship … [that is] concrete and supported by evidence").

[45] See *Envtl. Prot. Info. Ctr., Inc. v. Pac. Lumber Co.,* 257 F.3d 1071, 1074, 1077 (9th Cir. 2001).

[46] See *Thiry v. Carlson,* 78 F.3d 1491, 1494, 1496 (10th Cir. 1996).

[47] See *City of New York v. Anglebrook Ltd.,* 891 F. Supp. 908, 915, 927 (S.D. N.Y. 1995).

[48] See, e.g., *Greater Yellowstone Coalition v. Flowers,* 321 F.3d 1250, 1255 (10th Cir. 2003); *Lee v. Thornburgh,* 877 F.2d 1053, 1057 (D.C. Cir. 1989); *Save Our Sonoran, Inc. v. Flowers,* 2006 WL 1160191, *17 (D. Ariz. May 2, 2006); *St. John's United Church of Christ v. City of Chicago,* 401 F. Supp. 2d 887, 894–95, 906 (N.D. Ill. 2005); *Friends of Astor, Inc. v. City of Reading,* 1998 WL 684374, *1 (E.D. Pa. Sept. 17, 1998); *Virgin Islands Tree Boa v. Witt,* 918 F. Supp. 879, 884, 905 (D. V.I. 1996); *Enos v. Marsh,* 616 F. Supp. 32, 35 (D. Haw. 1984).

[49] *Pacific Coast Fed'n of Fishermen's Ass'ns v. Bureau of Reclamation,* 226 Fed. App'x 715, 717 (9th Cir. 2007).

[50] *Crutchfield v. U.S. Army Corps of Eng'rs,* 192 F. Supp. 2d 444, 450, 466–67 (E.D. Va. 2001).

[51] Statement of David Lawrence at 28. On October 21, 2011, U.S. EPA Region 10 issued the air permits Shell needs to begin its offshore Alaska exploration program. Environmental group petitioners immediately appealed the decision to the EPA's Environmental Appeals Board (EAB). On January 12, 2012, the EAB denied petitions for

review of the air permit. However, environmental petitioners have threatened to litigate. Shell's experience is discussed in detail in Section III of this report.

[52] *Ibid.* at 9.

[53] See 42 U.S.C. § 7475(c).

[54] *Avenal Power Center, LLC v. EPA,* No. 10-cv-383, 2010 WL 6743488, at *3 (D.D.C. May 26, 2011).

[55] *Ibid.* at *1.

[56] *Ibid.* at *3.

[57] *Ibid.*

[58] See 76 Fed. Reg. 55,799 (Sept. 9, 2011).

[59] See Dr. David Sunding, *Export Report: Economic Incentive Effects of EPA's After-the-Fact Veto of a Section 404 Discharge Permit Issued to Arch Coal 1*, 11 (May 30, 2011).

[60] Letter from Col. Robert Peterson, Dist. Eng'r, Corps, Huntington Dist. to William Early, Acting Reg'l Adm'r, EPA Region III at 3 (Sept. 30, 2009).

[61] Letter from Randy C. Huffman, WVDEP, to EPA at 4, 6 (Nov. 29, 2010).

[62] *Mingo Logan Coal Co. v. EPA,* No. 1:10-cv-00541 (D.D.C.).

[63] See EPA, Final Determination of the Assistant Administrator for Water Pursuant to § 404(c) of the Clean Water Act Concerning the Spruce No. 1 Mine, Logan County, West Virginia, 76 Fed. Reg. 3126 (Jan. 19, 2011).

[64] See Statement of Robin Mills Ridgway, Ph.D., P.E., director of environmental health and safety regulatory compliance, Purdue University, before the Energy and Power Subcommittee of the U.S. House of Representatives Energy and Commerce Committee at 1–2 (April 7, 2011).

[65] *Ibid.*

[66] *Ibid.*

[67] Federal Highway Administration, Biannual Assessment of SAFETEA-LU Section 6002 Implementation Effectiveness (September 2010).

[68] See 43 U.S.C. § 1652(d).

[69] *Ibid.*

[70] *Ibid.* § 1652(a) ("The purpose of this chapter is to [sic] insure that, because of the extensive governmental studies already made of this project and the national interest in early delivery of North Slope oil to domestic markets, the trans-Alaska oil pipeline be constructed promptly without further administrative or judicial delay or impediment.").

[71] Section 1608(b) of American Recovery and Reinvestment Act of 2009.

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